



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Violet Dock Port, Inc.

File: B-231857.2

Date: March 22, 1989

DIGEST

1. Agency determination to reject protester's proposal as technically unacceptable after evaluation of second best and final offer is reasonable, where agency conducted two rounds of discussions and amended the solicitation to advise offerors what was required to meet mandatory technical requirements for proposed layberthing facility, and incumbent protester nevertheless submitted a second best and final offer with design load engineering calculations based upon an approach that was different from the required approach.
2. Discussions were meaningful where agency directed protester to the deficient area of its proposal and, after first round of discussions amended the solicitation in a manner that further communicated the agency's concern with protester's technical approach.
3. After discussions and a request for best and final offers, an agency is not required to notify an offeror of deficiencies remaining in its proposal or first appearing in its best and final offer, or to conduct successive rounds of discussions until omissions are corrected and the proposal brought up to an acceptable level.
4. A technically unacceptable proposal need not be considered, irrespective of its low price.
5. Technically unacceptable offeror is not an "interested party" under General Accounting Office's Bid Protest Regulations to challenge legal status of proposed awardee, where other acceptable offers are in the competitive range and the protester would be ineligible for award in the event the protest were sustained.

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DECISION

Violet Dock Port, Inc., protests the proposed award of a contract to Galveston Maritime, Inc., under request for proposals (RFP) No. N00033-88-R-4001, issued by the Department of the Navy for layberth services. Violet, the incumbent contractor, contends that the Navy: (1) failed to disclose the award criteria during discussions; (2) altered evaluation factors and award criteria without giving notice of the alterations to Violet; (3) failed to conduct meaningful discussions with Violet "in that the substance of the agency's determinations, calculations, and desires were not disclosed" to Violet; (4) engaged in an improper conversation with Violet after the close of the second round of best and final offers (BAFOs) without allowing Violet an opportunity to respond; (5) failed to evaluate the benefit of Violet's lower price; and (6) should not have considered Galveston for award because Galveston was a non-existent entity when it submitted its second BAFO.

We in part deny and in part dismiss the protest.

Issued on April 29, 1988, the RFP sought layberth services for four SL-7 fast sealift ships--two ships on the East Coast of the United States and two ships on the Gulf Coast of the United States. The protest concerns the award of the Gulf Coast portion of the contract. The ships are extremely large (38,000-ton displacement and approximately 900 feet long) and configured to load and discharge military cargo (vehicles and rotary-wing aircraft) using roll-on/roll-off loading methods. Most of the time the ships are docked at their layberths and maintained in a reduced operating status.

The layberth consists of a pier and supporting facilities (guards, fencing, alarms, roadways, lighting, communications and utility services) located in an area having water of navigable depth and sufficient expanse (1,200-foot minimum turning basin) to maneuver the ships for docking. Since the ships are rarely at sea, the pier must be strong enough to moor the ships safely throughout the year--even during the hurricane season.^{1/} Consequently, the RFP

^{1/} The Navy was particularly concerned about the proposed facility's ability to hold the ships securely during a hurricane (70-mile per hour winds) since the ships have a 42,000 square foot "sail structure" (surface exposed to the wind) which the Navy advises is equal to the exposed surface (continued...)

placed considerable emphasis on the strength of proposed pier mooring systems^{2/}, and expressly required offerors to submit design load engineering calculations to validate their proposed mooring system designs.

The RFP provided that technical proposals would be evaluated on a pass/fail basis with award being made to the lowest priced technically acceptable offeror. Technical acceptability (i.e., meeting minimum technical requirements) was evaluated on the basis of compliance with nine elements. Three elements (Nos. 2, 3 and 4) bear on the issues protested here and read in part as follows:

"(2) Adequacy of the proposed berthing facility, e.g., pier physical and structural characteristics, load resisting capabilities, mooring line fittings, resilient fendering . . . etc.

"(3) Ability of ship to lie safely afloat at all times.

"(4) Degree of safety afforded the . . . ship from exposure to damage due to conditions of nature (including exposure to potential hurricane damage) or hazards within the port."

On July 29, 1988, the closing date for initial proposals, the Navy received multiple offers for the Gulf Coast lay-berthing. The agency evaluated each proposal on the specified pass/fail basis. During September, the agency conducted discussions with offerors in the competitive range informing them of the deficiencies in their respective proposals. On October 3, the agency issued Amendment 0007

^{1/}(...continued)
of a six-story high, 460-foot long building.

^{2/} The RFP envisaged a mooring system consisting of: (1) the pier, (2) pier fittings (bollards, bitts and cleats) and associated structures (dolphins--a cluster of closely driven piles designed to take a lateral load) around which the mooring lines are fastened, (3) fenders (rubber, rope or wood cushions) placed between the pier and the ship to lessen shock and prevent chafing, and (4) government furnished mooring lines. The typical pier has a bow/forward dolphin, a center dolphin, and an stern/aft dolphin which correspond in location to the bow, center and stern of the docked ship.

which both closed discussions with a request for BAFOs and further defined the agency's requirement for design load engineering calculations. Evaluation of the BAFOs disclosed that several offerors had incorrectly addressed the pier requirements and provided unacceptable design load calculations. Because it believed these proposals might yet be made acceptable, the Navy reopened discussions on October 26, with Amendment 0008 which further clarified the agency's expectations regarding design load engineering calculations. On November 4, after a second telephonic round of discussions, the agency received second BAFOs. The proposals were evaluated, Violet's offer was rejected as technically unacceptable, and all second round offerors were notified that Galveston was the apparently successful offeror.

The record shows that the agency sought assurance from the offerors' design load engineering calculations that in a worse case scenario of a moored ship yawing in a hurricane^{3/} the compression pressure exerted on the ship's hull by the resisting dolphin would not damage the ship. In this regard, the RFP advised that designs resulting in hull pressures in excess of 25 pounds per square inch (psi) were unacceptable. Violet's second BAFO was rejected because it proposed a design having the required strength to comply with the RFP's 25-psi hull pressure limit only at the center dolphin and not at the bow and stern dolphins.

Violet argues that the deficiencies underlying its rejection stem from two factors in its design load engineering calculations. First, there was confusion over the meaning to be ascribed to the symbol "M" in the RFP. The protester read it as meaning 1,000 and performed its design load calculations using a quarter wind moment of 52,500 pound-foot on that basis. The agency intended the symbol to mean 1,000,000 and expected offerors to perform their calculations using a quarter wind moment of 52,500,000 pound-foot. The agency states that it specifically advised Violet of the correct interpretation during the second round of discussions. Nevertheless, at an informal conference on this

^{3/} The agency refers to such a positioning of the ship as yawing since the hurricane-force, 70-mph winds strike the moored ship at an angle (quarter wind) and result in the ship turning by angular motion about its own vertical axis. In other words, the wind pushes one end (the bow) of the ship away from the pier, stretching the bow mooring lines, while forcing the other end (stern) of the ship into contact with a single dolphin (stern dolphin).

protest it was agreed that the protester's use of the lesser figure did not result in the rejection of its offer being rejected as unacceptable because the protester made another mistake in its calculations (failure to determine the applicable quarter wind force separately from the quarter current force) which more than offset the error related to Violet's misinterpretation of the symbol "M." In other words, despite the error the results were acceptable. Consequently, we need not consider the first factor further.

Violet characterizes the second factor responsible for its rejection as the requirement:

"that a maximum compression force calculation for the 25-psi hull pressure limit was required to be made on all contact dolphins, stern, center, and bow, regardless of the specific configuration of the particular design of the Violet Dock facilities."

Violet asserts that the agency's "desire for maximum compression force calculations on all dolphins, whether whimsy or otherwise, was not expressed in the Solicitation and was also never discussed with Violet Dock." Violet urges that without notice of this requirement, the RFP left offerors free to select the "anticipated point of maximum compression" upon which to base its design load calculations in light of "the particular configuration of the specific design of the offeror's facility." On the basis of its 5 years of experience as the incumbent contractor, Violet determined that for its facility the anticipated point of maximum compression was at the center dolphin and accordingly submitted a second BAFO that only proposed strengthening the center of its facility to comply with the RFP's 25-psi hull pressure limit. We note, however, that nothing in the record indicates that hurricane force winds ever struck the Violet facility during the past 5 years.

In our view, the crux of Violet's first three contentions--agency failure (1) to disclose the award criteria during discussions, (2) to give notice of changes to evaluation factors and award criteria, and (3) to conduct meaningful discussions--is that the agency, during discussions, improperly did not point out Violet's failure to meet the 25-psi hull pressure requirement on all dolphins as a weakness or deficiency in its proposal. Accordingly, the question presented is whether Violet was on notice from the RFP or discussions that the Navy wanted a facility designed to resist the pressure of a 38,000-ton vessel being pushed

by a 70-mph wind into either the bow or stern dolphins without damaging the hull of the vessel.

In order for discussions in a negotiated procurement to be meaningful, contracting officials must advise offerors of the deficiencies in their proposals, to afford offerors an opportunity to revise their proposals to fully satisfy the government's requirements. Federal Acquisition Regulation (FAR) § 15.610. However, the requirement for meaningful discussions does not mean that offerors are entitled to all-encompassing discussions; rather, agencies are only required to lead offerors into areas of their proposals needing amplification. Aydin Corp., B-227817, Sept. 28, 1987, 87-2 CPD ¶ 306. Furthermore, in reviewing protests concerning the evaluation of proposals, we do not reevaluate the proposals and make our own determinations about their respective merits. This is the responsibility of the contracting agency, which is most familiar with its needs and which must bear the burden of any difficulties resulting from a defective solicitation. Tiernay Turbines Inc., B-226185, June 2, 1987, 87-1 CPD ¶ 563.

The Navy reports that Violet's initial proposal consisted of information derived from its 1983 and 1984 proposals and was technically unacceptable, and therefore, Violet could have been excluded on the ground that a total rewrite would be required to make its proposal acceptable. However, the agency included Violet in the competitive range for purposes of discussions on the ground that Violet's incumbency rendered its offer susceptible to being made acceptable. During the September discussions Violet was represented by a non-engineer that the agency found unqualified to discuss the proposal's technical deficiencies. The Navy provided Violet's representative with a list of technical deficiencies for review by Violet's engineer. The agency reports that there followed a telephone conversation between the agency engineer and Violet's engineer which covered Violet's technical deficiencies and specifically discussed the concept of yawing, effects of yawing on the mooring structure, and its effects on the moored vessel's hull. Violet admits the phone conversation, but denies discussing compression force calculations or any desired calculations for one or more dolphins.

Issued on October 3, Amendment 0007 modified RFP Attachment C (guide for estimating wind and current forces) to require: (1) that "[b]ow/quarter wind calculations will include the abeam wind load reduced by a factor of 0.707 and applied with the yaw moment; and (2) "[w]hen calculating the bow/quarter loading, only one breasting structure [dolphin] will be assumed to carry the compression load and the moor-

ing lines on the opposite end of the ship will carry the tension load." Amendment 0007 also modified section C-3, pier requirements, under fendering to require "[t]he reaction load, (computed load) applied to the fendering system will be multiplied by a safety factor of 1.5 before determining the maximum allowable hull pressure of 25-psi." Amendment 0007 also closed the first round of discussions and requested that offerors submit BAFOs.

Violet's initial BAFO was found deficient because its mooring arrangement exceeded the maximum allowed hull pressure of 25-psi as a result of improper design loads for mooring dolphins and erroneous current and wind force calculations.

Amendment 0008, issued on October 26, reopened discussions because of problems the government was encountering in describing its requirements for engineering calculations. Offerors were advised that fendering system reaction load capacity (minimum acceptable capacity was 150 foot-tons) had to be calculated for the worst lateral load that the fender had to restrain.

The agency reports that, on October 31, it telephonically discussed the deficiencies in Violet's first BAFO, and explained the reasoning behind the issuance of Amendment 0008. Specifically, the inconsistency between Violet's strong center dolphin and weaker bow and stern dolphins was pointed out in light of the requirement to consider the effects of yawing. Violet contends that the agency did not comment concerning compression force calculations or any desired calculations for one or more dolphins; however, Violet admits that its engineer discussed using the center dolphin as the anticipated maximum compression point and Violet points out that this approach had been used and accepted for Violet's current contract.

Violet's second BAFO, submitted November 4, proposed a parallel three-in-line dolphin mooring system with all the load on the center fender. After evaluating Violet's second BAFO, the agency phoned Violet on November 8 to clarify that the protester would only be strengthening the center dolphin and not the bow and stern dolphins. The protester confirmed that this was correct. Since this approach was contrary to the agency's interpretation of the guidance it had provided Violet during oral discussions and in Amendments 0007 and 0008, Violet's proposal was found technically unacceptable for taking exception to a material requirement and was rejected.

Regardless of Violet's objection to the agency's version of the subject matter covered during the two rounds of discus-

sions, we think the list the agency provided to Violet's representative during the September discussions together with Amendment 0007 gave Violet sufficient notice of the deficiencies in its proposal. The RFP established a base line requirement, that proposed facility designs consider the safety of a moored ship's yawing during a storm when that yawing results in the hull impacting one dolphin's fender, when it specified that the fenders be able to "[w]ithstand maximum anticipated compression forces (including point loading due to yawing) for winds up to 70 mph (from various points of the compass)." Violet's deficiency resulted from its decision to base its calculations as it had for its current contract on the assumption that the requirement only applied to the center dolphin of its facility because of its belief that in the described yawing situation only the center dolphin would receive the impact of the ship's hull. The list provided Violet's representative in September clearly identified Violet's failure to address the pier requirements including both mooring line fittings and fendering. In addition, Amendment 0007, issued at the close of the first round of discussions, should have caused Violet to reexamine its assumptions and cure the deficiency. Amendment 0007 directed offerors to apply the bow/quarter wind calculations with the yaw moment, and specified that one dolphin had to carry the compression load when calculating bow/quarter loading while "the mooring lines on the opposite end of the ship will carry the tension load." (Emphasis supplied.) Since ships are rigid structures and the amendment directed offerors to perform their calculations for the dolphin located at opposite end of the pier from the stretching mooring lines, it was clearly unreasonable for Violet to insist on basing its calculations on the dolphin at the center of the pier. Moreover, offerors had to consider both bow and stern dolphins since the RFP required consideration of the effects of winds from various points of the compass. For example, while a wind from the bow quarter could place a compression load on the stern dolphin and stretch the bow lines at the opposite end of the ship, a wind from the stern quarter could reverse the compression load placing it on the bow dolphin and stretch the stern mooring lines at the opposite end of the ship. Thus, we think that Amendment 0007 met the agency's obligation to conduct meaningful discussions since it led the protester into the areas of its proposal requiring correction. See Target Financial Corp., B-226683, June 29, 1987, 87-1 CPD ¶ 641.

To the extent that Violet implies that enforcement of the minimum technical requirement is unreasonable because the Amendment 0007 term "opposite end of the ship" is ambiguous, the argument is untimely. Our Bid Protest Regulations

provide that protests based on alleged improprieties incorporated into a solicitation by amendment must be filed not later than the next closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1988). Here, Amendment 0007 specifically stated that the calculations had to be based on dolphins located at the opposite ends of the ship; if Violet believed this requirement to be ambiguous or restrictive, Violet was required to protest on this basis before second BAFOs were due on November 4. See R.T. Nelson Painting Services, Inc., B-227953, Oct. 16, 1987, 87-2 CPD ¶ 368, aff'd, R. T. Nelson Painting Services, Inc.--Request for Reconsideration, B-227953.2, Feb. 26, 1988, 88-1 CPD ¶ 198.

We find no merit in Violet's allegation that the agency improperly engaged in a conversation with Violet on November 8 after receiving Violet's second BAFO but did not allow Violet yet another opportunity to revise its proposal. The conversation was merely to confirm that Violet only intended to strengthen the center dolphin and not the bow and stern dolphins. We see no reason to question the agency's assertion that it was merely clarifying an ambiguity in Violet's second BAFO under FAR § 15.601 and not reopening discussions. In any event, agencies are not required to notify offerors of deficiencies remaining in their proposals, or first appearing in a BAFO, or to conduct successive rounds of discussions until omissions are corrected. IPEC Advanced Systems, B-232145, Oct. 20, 1988, 88-2 CPD ¶ 380. Consequently, an offeror should not anticipate a further opportunity to revise its proposal after submission of a BAFO. Conrac Corp., SCD Division, 66 Comp. Gen. 444 (1987), 87-1 CPD ¶ 497.

Violet also contends that its low proposed price entitled it to further consideration during the evaluation despite its technical unacceptability. However, the solicitation made it clear that proposals would first be judged for technical merit on a pass/fail basis before cost was considered. Moreover, an agency is not required to consider lower proposed cost where a proposal is judged technically unacceptable. GLH, Inc., B-232156, Nov. 18, 1988, 88-2 CPD ¶ 490.

Finally, we will not consider Violet's contention that an award to Galveston is improper because Galveston was a non-existent entity when it submitted its second BAFO. Generally, a protester that takes exception to a material requirement is not an "interested party" under our Regulations, 4 C.F.R. § 21.0, to challenge the acceptability of another offeror's proposal when there are also other

acceptable offers because even if the protest were sustained the protester would not be eligible for an award. That is the case here. Therefore, we will not consider the matter. Conrac Corp., SCD Division, 66 Comp. Gen. 444, supra. In any event, the record shows that Galveston has perfected its corporate status.

The protest is denied in part and dismissed in part.

for Seymour E. Hinchman
James F. Hinchman
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